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No. 89-1799

In The

Supreme Court of the United States

October Term, 1990

JEFFREY M. MASSON,

Petitioner,

vs.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and
JANET MALCOLM,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

ARGUMENT 1

A. PROTECTION OF FALSE QUOTES WOULD SACRIFICE ALL FIRST AMENDMENT RIGHTS EXCEPT THOSE CLAIMED BY THE MEDIA... 1

B. FABRICATED QUOTES CHANGED MEANING OF MASSON'S WORDS AND WOULD BE FALSE EVEN IF THERE WERE NO CHANGE IN MEANING 1

1. FABRICATIONS DIRECTLY CONTRADICTED ACTUAL STATEMENTS MADE BY MASSON 2

2. "SUBSTANTIAL TRUTH" DEFENSE DOES NOT PROTECT FABRICATED QUOTES REGARDLESS OF WHETHER THERE IS A CHANGE IN MEANING..... 5

3. "SUBSTANTIAL TRUTH" WOULD PROTECT ACCURATE PARAPHRASES, WHICH HAVE A DIFFERENT EFFECT ON THE AUDIENCE..... 6

C. RIGHT TO DOCTOR QUOTATIONS IS NOT IMPORTANT TO THE OPERATION OF A FREE AND ROBUST PRESS 8

CONCLUSION 12

TABLE OF AUTHORITIES CITED

Page

Cases

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 1

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 10

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. ___, 109 S.Ct. 2678 (1989) 9, 11

Hotchner v. Castillo-Puche, 511 F.2d 910 (2d Cir.), *cert. denied sub nom Hotchner v. Doubleday & Co.*, 434 U.S. 839 (1977) 9

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 8, 11

Milkovich v. Lorain Journal Co., 110 S.Ct. 2695 (1990) 8

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 10, 11

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 10

St. Amant v. Thompson, 390 U.S. 727 (1968) 8, 11

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 10

Time, Inc. v. Pape, 401 U.S. 279 (1971) 11

Vance v. Terrazas, 444 U.S. 252 (1980) 2

Constitution

United States Constitution, Amendment 1 ..... 1, 6, 9, 10

Rules of the Supreme Court

Rule 14.1(a) 2

TABLE OF AUTHORITIES CITED – Continued

Page

Miscellaneous Citations

Keeton, et al., *Prosser and Keeton on Torts* (5th ed. 1985) 5

Restatement (Second) of Torts 5

Sack, *Libel, Slander and Related Problems* (1980) 5

Smolla, *Law of Defamation* (1990) 5

Webster's Third New International Dictionary (1981) 7

ARGUMENT

A. PROTECTION OF FALSE QUOTES WOULD SACRIFICE ALL FIRST AMENDMENT RIGHTS EXCEPT THOSE CLAIMED BY THE MEDIA

The Brief for Respondents makes no attempt to deny or minimize the danger posed to First Amendment values by a rule encouraging deliberately manufactured quotations, though the potential damage to free speech rights of misquoted speakers and their intended audience was addressed at length in Brief for Petitioner 28-31, Brief *Amicus Curiae* of Certain Journalists and Academics in Support of Petitioner 5-10, and Brief *Amicus Curiae* of Mountain States Legal Foundation In Support of Petitioner 5-9. Respondents' obvious, though unstated, premise is that the media's claim to First Amendment protection, however vague, obliterates any other constitutional interests in accurate quotation. This Court must not endorse respondents' skewed constitutional vision: "[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978).

B. FABRICATED QUOTES CHANGED MEANING OF MASSON'S WORDS AND WOULD BE FALSE EVEN IF THERE WERE NO CHANGE IN MEANING

Largely abandoning the rationale of the Ninth Circuit's holding, respondents focus on the issue of falsity and ask this Court to impose a two-tiered burden of proof on those defamed by misquotation. (Resp. Br. 13-19, 32-35). Their suggested distinction between words and meaning would not affect the outcome in this case, which

involves the deliberate distortion of both, and is based on a misconception of the common law "substantial truth" doctrine. It is also inconsistent with the argument that a speaker's words should be treated as facts (Resp. Br. 14, 16-19) – if so, then a quote containing defamatory words never used by the speaker has to be considered false.

1. FABRICATIONS DIRECTLY CONTRADICTED ACTUAL STATEMENTS MADE BY MASSON

Contrary to suggestions in the opposing brief, Masson has always contended that respondents knowingly changed his words and his meaning. The fabricated quote, "I was like an intellectual gigolo," (J.A. 94), was not an "utterly insignificant" (Resp. Br. 13) change in wording from his actual comment that he was "a private asset but a public liability."[1]

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[1] The Court should ignore the specious contention (Resp. Br. 39) that this petition does not challenge the Ninth Circuit's statement that "intellectual gigolo" was not defamatory. The first Question Presented addresses "quotations that are attributed to and defame a public figure." Under Supreme Court Rule 14.1(a) a question "is deemed to comprise every subsidiary question fairly included therein," and it would be pointless for the Court to determine whether Janet Malcolm fabricated a non-defamatory quote with actual malice. Where resolution of a subsidiary legal question is "predicate to intelligent resolution" of the question presented, the Court should consider it. See *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980).

The Ninth Circuit's decision turned on its determination that there was no actual malice; responding to an argument by the dissent, the majority also stated without citation to state or federal law that the quotation was not defamatory. (Pet. App.

(Continued on following page)

The fabricated quote implies that Masson was willing to prostitute himself intellectually, an implication that, as respondents acknowledge, is "deeply inconsistent" with what Masson said elsewhere in the article. (Resp. Br. 40-41). Incredibly, respondents argue that a reader confronted with this inconsistency would not conclude that Masson was an unprincipled hypocrite, but would attempt a benign reconciliation of "intellectual gigolo" with contradictory statements scattered throughout 130 pages of the article. (*Id.*) Actual readers of the article did not strain to find an innocent meaning for what Masson said, as shown by the severe criticism of him in reviews of the article. (See Pet. Br. 14-15; J.A. 80-81). Malcolm's

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A at A-15). The Court went on to cite the "incremental harm" theory discussed in two federal cases as a basis for finding the quotation non-defamatory, (Pet. App. A at A-15-1), and this was specifically addressed in the third Question Presented.

Respondents' other waiver arguments are no more persuasive. The Ninth Circuit did not hold that the "sex, women, fun" passage was substantially true, (Pet. App. at A-17, 18), as respondents suggest. (Resp. Br. 41). The first Question Presented addresses "publication" of fabricated quotations, clearly challenging the Ninth Circuit's failure to find liability on the part of Malcolm's publishers, (Pet. App. A at A-30), despite respondents' contrary claim. (Resp. Br. 47).

Finally, Pet. Br. 13 n.2 indicates that Masson continues to challenge all of the false quotes, though there is no need for this Court to analyze each passage addressed by the Ninth Circuit, and respondents' repeated claims to the contrary should be disregarded. (Resp. Br. 13, 17 n.20, 18 n.21, 43, 44 n.44).

knowledge that Masson consistently denied that his principles were for sale demonstrates that she knew he did not and would not ever call himself an "intellectual gigolo."

Respondents make the same misguided argument regarding Masson's purported statement that he was "the wrong man" to do "the honorable thing." (J.A. 215). The statement *was* totally "out-of-character," (Resp. Br. 37), but an average reader would not somehow intuit that Masson therefore actually meant that he "did not view keeping silent as an honorable course of action." (Resp. Br. 36). This unrealistically innocent gloss on the passage is closer to what Masson actually said, but his words had been altered so that the article conveyed the opposite meaning.

Malcolm was similarly aware of statements by Masson that contradicted other fabricated quotes:

WHAT MALCOLM KNEW MASSON HAD ACTUALLY SAID	WHAT THE ARTICLE SAID MASSON HAD SAID
"I felt I should say something because the paper's still well within the analytic tradition. . . . I really must say one thing that I really believe, that's not going to appeal to anybody and that was the very last sentence. Because I really do believe psychoanalysis is entirely sterile and I believe that one, . . . " (J.A. 176).	"That remark about the sterility of psychoanalysis was something I tacked on at the last minute and it was totally gratuitous. I don't know why I put it in." (J.A. 175)
"I assure you when [my] book comes out, . . . there is not an analyst in the country who will say a single word in favor of it." (J.A. 136)	"Wait till it reaches the bestseller list and watch how the analysts will crawl," he crowed. "[T]hey will say that Masson, is a great scholar, a major analyst – after Freud, he's the greatest analyst who ever lived." (J.A. 135).

2. "SUBSTANTIAL TRUTH" DEFENSE DOES NOT PROTECT FABRICATED QUOTES REGARDLESS OF WHETHER THERE IS A CHANGE IN MEANING

Each of the altered or fabricated quotes changed the meaning of Masson's words, causing a distinct damage to his reputation. But even if the manufactured quotes simply changed Masson's words, they would still be false quotes. The "substantial truth" doctrine relied on by respondents (Resp. Br. 15-16) does not protect those who invent new, defamatory charges:

> An allegation that the plaintiff embezzled $50 from the First State Bank cannot be proved substantially true with evidence that the plaintiff embezzled $100 from the Second National Bank. . . . Specific charges of particularized crimes cannot be refuted with general evidence of other, similar activity, or by an attack on the general bad character or misconduct of the plaintiff.
>
> Smolla, *Law of Defamation*, 5-18-5-19 (1990). *See also* Restatement (Second) of Torts §581A, comment f; Keeton, et al., *Prosser and Keeton on Torts*, 841-42 (5th ed. 1985); and Sack, *Libel, Slander and Related Problems* 139 (1980).

Minor inaccuracies in describing what actually happened (e.g., plaintiff stole $25,000 from the bank rather than the $50,000 defendant reported) are protected as substantially true, but inaccuracies that charge plaintiff with committing a different defamatory act are simply false. *Id.* Respondents therefore misstate the common law in arguing that, because they believe Masson is egotistical (general bad character) or made egotistical statements (other activity), they can invent any other egotistical statement and ascribe it to him. (Resp. Br. 45-46). Writers are no more entitled to fabricate defamatory words than they would be to fabricate defamatory acts.

If Masson had actually "crowed" that analysts would say he was the "greatest *therapist* who ever lived," Malcolm's fabricated quote that analysts would say he was the "greatest *analyst* who ever lived" (J.A. 135) might have been substantially true. Minor changes in wording to correct syntax or false starts would be protected because the quotes would still be substantially true but not, as respondents suggest, because of the purpose for the alteration. (Resp. Br. 26-27). Even wholly invented quotes would usually not be defamatory and, though false, would not prompt a lawsuit. But if a writer deliberately invents a false, *defamatory* quote, or uses fabricated quotes to place a speaker in a false light, the First Amendment should not immunize those calculated falsehoods.

3. "SUBSTANTIAL TRUTH" WOULD PROTECT ACCURATE PARAPHRASES, WHICH HAVE A DIFFERENT EFFECT ON THE AUDIENCE

Although the substantial truth defense cannot protect a writer who fabricates quotes, it would provide a

complete defense in any case involving an accurate paraphrase. By definition a paraphrase is "a restatement . . . giving the meaning in another form . . . . " Webster's Third New International Dictionary (1981). Any reader of a paraphrase would understand that the writer was restating the speaker's words, so the writer could truthfully provide any restatement that conveyed the same meaning as the actual words.

A writer's use of a direct quote evokes a different reaction from the reader, who rightfully understands, as Malcolm explained to the *New York Times*, that everything in quotes "was said by [the speaker], almost work for word. (The 'almost' refers to changes made for the sake of correct syntax.)" (J.A. 222). A writer who places invented words inside quotation marks is falsely stating that the speaker used those words.

Respondents' entirely unsupported contention that there is no distinction between a reader's perception of quotes as opposed to paraphrases (Resp. Br. 23-27) is not only contrary to common sense, (Pet. App. A at A-70-73 (Kozinski, J., dissenting)), but also at odds with a declaration of the *New Yorker's* famed former editor-in-chief: " 'the *New Yorker* "id.al is a verbatim quote." ' " (Pet. App. A at A-67 n.17) (Kozinski, J., dissenting). Precisely because direct quotes add to a story's immediacy and readability, (Resp. Br. 30), false quotes pose a more serious threat to reputation than false paraphrases. The reader believes the writer has *not* tampered with the quoted words, which damn the speaker far more effectively and irrefutably than would a faulty restatement.[2]

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[2] The concerns expressed in the Brief *Amici Curiae* of Home Box Office, Inc., et al. are seriously overstated precisely

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There is no reason to encourage writers to fabricate any quotes, even if they do later deny that they intended to change the speaker's meaning. (Resp. Br. 35-36, 38, 43-45). "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, . . . " *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

Respondents' attempts to constitutionalize the "substantial truth" defense should fail. Their proposed requirements for establishing knowing or reckless falsity are based on a complete misstatement of that common law doctrine. Because this extravagant protection of fabricated quotes would interfere with free speech rights of public figures and the public, the Court should be even more reluctant than it was in *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2706-07 (1990), to require an additional constitutional inquiry based on respondents' creation of an "artificial dichotomy."

C. RIGHT TO DOCTOR QUOTATIONS IS NOT IMPORTANT TO THE OPERATION OF A FREE AND ROBUST PRESS

Masson is not asking this Court to "regulate journalistic standards for their own sake." (Resp. Br. 20). If

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because of the different perception of the audience for movies and docudramas. Far from being the death of fiction, a victory for Masson would have no effect on works that are not of and concerning a particular real person, or that clearly state that the conversations are fabricated. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

journalists and journalism professors suddenly decided to encourage the deliberate alteration and fabrication of quotes (a position specifically rejected in the Brief of *Amici Curiae* The Times Inc. Magazine Company, et al. 2) respondents would still be liable for publishing the article with actual malice. The fact that quotations traditionally have served a particular journalistic function simply reinforces the conclusion that Malcolm and her publishers knew they were falsely representing to their readers that Masson had actually uttered the words in quotation marks. (Pet. Br. 25-26).[3]

One question never answered by respondents or by any of the *amici curiae* supporting them is whether fake quotes are "of a character" protected by the First Amendment. (Pet. Br. 24 (quoting *Harte-Hanks Communications,*

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[3] Brief of Association of American Publishers, Inc., et al. argues that the publishers should be immune from liability unless there was "persistent inaccuracy" that causes suspicion in the publisher's mind. (A.A.P. Br. 9-13). In this case, though Malcolm had told her editor that everything was on tape, *every* fact or quote checked by the *New Yorker* was false. (Pet. Br. 5-6). The *New Yorker* checked no more quotes, and knowingly published the false (but non-defamatory and so non-actionable) facts. Knopf, by the time it published the book, was aware that the accuracy was disputed and that a complaint had been lodged against Malcolm, (Pet. Br. 14), yet made only a minor alteration. As in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2698 (1989), the publisher's inaction would be evidence of actual malice, particularly where, in contrast to *Hotchner v. Castillo-Puche*, 511 F.2d 910, 912 (2d Cir.), *cert. denied sub nom Hotchner v. Doubleday & Co.*, 434 U.S. 839 (1977), all passages were easily subject to "independent verification" in the tapes.

Inc. v. Connaughton, 491 U.S. ___, 109 S.Ct. 2678, 2696, 2698-99 (1989))). This Court has required such an inquiry since *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), but respondents cannot justify what they did to Masson, and so do not attempt it. Although they ultimately acknowledge that true quotations have constitutional value beyond that of paraphrases, (Resp. Br. 29-30; *cf. id.*, 23-24), respondents cannot explain why deliberately altered and manufactured quotes must be encouraged in order to protect truthful quotation.

In the typical libel case,

> Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.
>
> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)

That tension is absent here – there will be a vigorous press even if journalists are not encouraged to fabricate quotes, and when writers engage in such calculated falsehoods, "the public's interest in an uninhibited press is at its nadir. . . ." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 784 (1986) (Stevens, J., dissenting).

The media's undifferentiated desire to publish defamatory speech is not a sufficient basis for extending constitutional protection. Before increasing the risk of uncompensated damage to reputation, there must be some "convincing assurance that such a sacrifice is required under the First Amendment." *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

This Court's traditional application of *New York Times* standards provides ample protection for anyone who tries but fails to quote a speaker accurately, as described in Time Br. 11-21. *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968). If the speaker's statements are unusable as quotes, a writer may paraphrase and, as long as the paraphrase is accurate or a rational interpretation of ambiguous statements, will be protected. *Time, Inc. v. Pape*, 401 U.S. 279, 287-89 (1971). What the writer may not do is what respondents did here – attribute fabricated words to the speaker in direct quotation.

Unlike the rule proposed by respondents or the holding of the Ninth Circuit, petitioner asks this Court to elucidate a simple, "principled standard," *Hustler Magazine v. Falwell*, 488 U.S. 46, 55 (1988), which will give clear "content to these otherwise elusive constitutional standards." *Connaughton*, 109 S.Ct. at 2695. Writers faced with the constitutionally dangerous temptation to deliberately alter or fabricate a defamatory quote will know that liability may be imposed if they yield to the temptation. They will not have to speculate about whether the fabrication is consistent with the speaker's lifestyle or reflects the substance of the speaker's self-appraisal. (Pet. App. A at A-18).

Since no member of the media has yet to come forward with a plausible reason to encourage false quotes, the Court should protect the legitimate interests of public figures in their reputation and their right of free speech.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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